Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

LUIZ BEN ZVI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MATTHEW MURASKIN
Attorney for Petitioner
34 Julia Circle
Middle Island, NY 11953
(631) 924-1486

186411

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. The first question presented is whether the United States Court of Appeals for the Second Circuit in denying petitioner's application for a certificate of appealability and dismissing her appeal properly followed the standard set forth in *Miller-el v Cockrell*, 537 U.S. 322 (2003) and *Slack v McDaniel*, 529 U.S. 473 (2000) in holding petitioner did not make a ". . . substantial showing of the denial of a constitutional right. 28 U.S.C. § 2235(c)".

2. The second question presented is whether the petitioner's claim that her lawyer on her second direct appeal did not provide her with effective assistance of counsel by failing to raise and present arguments with regard to the Statute of Limitations and the effects thereof that would have resulted in the dismissal of the claims against her or grant her a new trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Louise Be Zvi, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit denying after reconsideration petitioner's application for a certificate of appealability and dismissing her appeal.

DECISIONS AND ORDERS BELOW

The order and decision of the United States Court of Appeals for the Second Circuit denying the motion for reconsideration is reproduced in the appendix as App 1a. The order denying the application for a certificate of appealability in the Second Circuit Court of Appeals is reproduced as App 3a. The decision of the United States District Court for the Eastern District of New York (Platt, J.) denying petitioner's application for relief under 28 U.S.C. § 2255 is reproduced as App 6a and the decision denying a certificate of appealability is reproduced in the appendix as App 8a. The Notice of Appeal filed in the District Court is reproduced in the Appendix as 10a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit issued its order denying the certificate of appealability on October 1, 2003 and thereafter treating petitioner's application for rehearing en banc as a motion for reconsideration denied same on December 23, 2003 (Miner, Calabresi, Straub).

STATEMENT OF CASE

INTRODUCTION

On June 14, 1995, petitioner was convicted after a jury trial in the United States District Court for the Eastern District of New York of conspiracy to commit wire fraud as well as domestic and international money laundering and other charges including tax evasion.

On August 11, 1993 four days before the statute of limitations expired on the object of the conspiracy, wire fraud, and the substantive offense of wire fraud she was indicted for allegedly participating in a conspiracy to conduct a fake robbery of a jewelry store on February 26, 1998 which was owned by her brother and in which she worked. In addition to the sole object of the conspiracy to commit wire fraud in count 1, she was charged with the substantive count of wire fraud in count 2 based upon a wire transfer from the insurance company (Lloyd's of London) to an account at Chemical Bank in New York on August 15, 1988 in the Southern District of New York.

The Government, on September 15, 1993, thirty days after the statute of limitations ran on the wire fraud both as substantive offense and object of the conspiracy, filed its first superseding incitement which was just about identical to the first indictment but added her brother as a defendant and added as overt acts that between August 1988 and December 1989 the two caused checks to be drawn from the Chemical account in payment of the insurance claim.

On March 15, 1994 the Government filed a second superseding indictment which alleged that prior to the

February 26, 1988 robbery she and her brother sold the gold that was claimed to be stolen and that they laundered the proceeds via a wire fraud through international funds transfers described in count 1.

The domestic and international money laundering charges as well as the false tax return were charged as additional objects of the conspiracy in count one. She and her brother were also charged with seven counts each of money laundering for the seven funds transfers mentioned above. Forfeiture was also sought.

A third superseding indictment was filed on May 10, 1994, which restated the March 15, 1994 indictment but alleged two additional funds transfers on November 21, 1988 and March 1, 1989.

Prior to petitioner's trial the District Court dismissed the substantive wire fraud count for lack of venue as well as holding that some money laundering charges were time barred.

Petitioner was sentenced on June 26, 1997 and the application for reconsideration of the decision for reargument was made and eventually denied.

On appeal (168 F.3d 49 (2nd Cir 1999)) the Appellate Court reversed in part and affirmed in part. The substantive money laundering counts in indictments 3 and 4 were vacated as being time barred (*Ben Zvi I* at 55) as were the corresponding object of the conspiracy but the Court sustained the conspiracy convictions because though the money laundering objects of the conspiracy were time barred as well, the Court found that the jury determined wire fraud

as an independent object of the conspiracy and no challenge to the timeliness of the wire fraud object was made during the appeal (*Ben Zvi 1* at 56; *Ben Zvi 2* at 94). The forfeiture was set aside but the tax evasion objects of the conspiracy were sustained.

On remand from the Second Circuit petitioner was sentenced to sixty months imprisonment and required to make future restitution in the amount of $6,624,512. On appeal that judgment was affirmed. 242 F.3d 89 (2nd Cir. 2001).

Petitioner thereafter brought an application pursuant to 28 U.S.C. § 2255 in the United States District Court for the Eastern District of New York which was denied in an order and decision entered on March 12, 2003 (Platt, J.). That Court on April 18, 2003, denied an Application For Certificate Of Appealability and a further Application For A Certificate Of Appealability was denied at the Second Circuit on October 1, 2003, as was a motion for reconsideration on December 23, 2003.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Second Circuit in denying the application for a Certificate of Appealability and dismissing the appeal did not properly follow this Court's standards as set forth in *Miller-el v Cockrell*, 537 U.S. 322 (2003) and *Slack v McDaniel*, 529 U.S. 473, 484 (2000) in holding that petitioner did not make a ". . . substantial showing of the denial of a constitutional right. 28 U.S.C. § 2235(c)".

The constitutional claim asserted in the Petition For Relief at the District Court was that petitioner was represented

by ineffective counsel pre trial and on both appeals and that counsel on the second appeal failed to raise the ineffectiveness of counsel on the first appeal and pre trial and that he was himself separately ineffective.

The Second Circuit was wrong in its unstated analysis and perforce it conclusion that petitioner did not make a substantial showing of the denial of a constitutional right.

Even before *Miller-el*, supra the standard for a certificate of probable cause or certificate of appealability was that petitioner merely present a colorable claim of a constitutional error. (*United States v Cepero*, 224 F.3d 256, 263 (3rd Cir. 2000) citing *Barefoot v Estelle*, 463 U.S. 880) that is not plainly frivolous (*Gardner v Pogue*, 558 F.2d 548, 549 (7th Cir. 1977); *Poe v Gladden*, 287 F.2d 249 (9th Cir. 1961)). *Gardner*, *supra* is very instructive because it indicates the difference between "not frivolous" and "substantial" is one of art subject to subtle analysis though basically both have the same meaning and in terms of the standard to be applied they mean nothing more than something higher than the good faith requirement in a forma pauperies application. For, as the Seventh Circuit held, the purpose of the Certificate of Appealability is merely to screen out clearly unmeritorious appeals *Buie v McAdory*, 322 F.3d 980 (7th Cir. 2003).

In fact petitioner need not even show she would prevail on the merits because she has already failed. All that has to be shown is that a Court could resolve the issue in a manner different from that of the District Court *United States ex rel. Escobar v Gilmore*, 1989 WL 6154 (N.D. Ill. 1989). As long as the petition is not merely conclusory (*see Wallace v Clason*, 2003 WL 1798943 (D.C. Cir. 2003) the inability to show an ultimate entitlement to the relief sought in the petition does

not bar the issuance of the certificate of appealability. *Miller-el v Cockrell*, *supra*; *Slack v McDaniel*, *supra*; *Barefoot v Estelle*, *supra* at 893, which is a separate proceeding distinct from the underlying merits of the petition. *Miller-el* citing *Slack*, *supra* at 481.

Any fair reading of petitioner's claim, leads to the conclusion that the Second Circuit applied an impermissible standard, contrary to *Miller-el* and *Slack*, that considered entitlement to the ultimate relief rather than examining the petition as a proceeding distinct from the underlying merits of the application.

Miller-el clearly held that petitioner need not show she was entitled to the ultimate relief but only that reasonable jurists would find the District Court's assessment of the constitutional claim to be either debatable or wrong – and debatable does not require that the jurists eventually agree with petitioner's contentions. *See also Slack v McDaniel*, *supra*.

Applying *Miller-el* and *Slack* which really only clarified and restated existing law, it was at least debatable that petitioner was represented by ineffective counsel.

In addition, the certificate of appealability should have been granted because the Second Circuit never addressed the issue in the District Court's original memorandum claiming, erroneously, that petitioner raised the issues herein before the Second Circuit and that the Court rejected same. The District Court in its memorandum adopted the brief of the government in coming to its conclusion but the government was in error. In *Ben Zvi 2* at 94 the second circuit held no challenge to the timeliness of the wire fraud object

was made during the first appeal and the issue, that the object of the conspiracy was time barred arose after the court of appeals in the second appeal dismissed the August 11th 1993 indictment. The District Court never really discussed the claim on its merits and the Second Circuit by holding there was no substantial showing of a denial of constitutional right never considered the District Court's position.

In denying the certificate of appealability the District Court confused the issue by gratuitously stating that if petitioner was resentenced she would in all probability get the same term. Resentence, however, is not an issue herein as dismissal of wire fraud as object of the conspiracy requires a vacatur of the conviction as well as a dismissal of the restitution and a new trial on tax evasion as object of the conspiracy.

In addition the Second Circuit in denying the certificate of appealability could not have addressed the issue that the District Court was in error in holding there was no prejudice.

In the Certificate of Appealability Application to the District Court petitioner alleged her constitutional rights were violated because her lawyer on the second direct appeal did not provide her with the required assistance of counsel to which she was entitled because he did not argue that both trial (*Strickland v Washington*, 466 U.S. 684 (1984); *United States v Cronic*, 466 U.S. 648 (1984) and prior appellate counsel (*Evits v Lucy*, 469 U.S. 387 (1985)) failed to raise and present arguments with regard to the statute of limitations that would have resulted in a dismissal of the claims against her and grant her a new trial.

Further, because of the requirements of the due process clause in the Fifth Amendment, a conspiracy conviction cannot be had where one or more objects of the conspiracy are invalid and it is not possible to tell which ground the jury selected. *Yates v United States*, 354 U.S. 298, 312 (1957); *Stromberg v California*, 283 U.S. 359 (1931); *United States v Ben Zvi*, 168 F.3d 49, 55 (2nd Cir 1999); *United States v Choy*, 309 F.3d 602, 608 (9th Cir. 2002); *United States v Baroca*, 56 F.3d 1087, 1097 (9th Cir. 1995); *United States v Fuchs*, 218 F.3d 957, 961-962 (9th Cir. 2000). The conviction, herein, therefore, must be set aside since one of the grounds supporting the conviction was legally or constitutionally invalid. *Yates*, *supra*; *Stromberg*, *supra*; *Burks v United States*, 437 U.S. 198 (1978); *cf. Griffin v United States*, 502 U.S. 46 (1991). In each of the Supreme Court cases cited this Court reaffirmed the basic principal that a general verdict may not stand when it is possible that the jury rested their determination on a legally infirm ground. In the present case we do know the ground the jury selected because the Second Circuit so held, and of course, that Court should be bound by that decision (*Ben Zvi 1* at 56).

> As to Luiz Ben Zvi, the issue is somewhat closer because she was convicted only for conspiracy and on time barred money laundering counts. However, wire fraud, a legally valid object of the conspiracy, was an essential element of the money laundering counts; under the government's theory, the wire fraud was the "specified unlawful activity" giving rise to laundered proceeds. As a result, by convicting (petitioner) of money laundering (albeit on time barred counts,) *the jury necessarily found that she engaged in the object of wire fraud. The jury's money laundering verdict*

> *convincingly demonstrates that the jury found the object of wire fraud, which fell within the limitations period.* (Emphasis added)

If a conviction cannot be had where we do not know which ground the jury selected it surely follows that the result must be the same when we do know the ground and that ground is legally deficient. *See Griffin v United States*, 502 U.S. 46 (1991) and cases cited therein. In *Griffin* the Court declined to reverse the verdict therein but clearly indicated *Yates*, *supra*, was good law. *Id.* at 60; *see also United States v Boots*, 80 F.3d 580 (1st Cir. 1996); *United States v Foley*, 73 F.3d 484 (2nd Cir. 1996); *United States v Pettigrew*, 77 F.3d 1550 (5th Cir .1996); *United States v Palazzolo*, 71 F.3d 1233 (6th Cir. 1995). Regardless of whether there was sufficient evidence for the jury's determination in petitioner's case the object which they may have found was just legally inadequate thus requiring that the verdict be set aside. This is made even clearer in *Ben Zvi 2* at 97 wherein the Second Circuit held that the wire fraud conspiracy charged in the first indictment was time barred because none of the alleged overt acts took place within five years of the return of the indictment. Ipse dixit, the object of wire fraud found by the jury according to *Ben Zvi 1* was time barred and could not have been sustained if the issue was properly put before the Court, pre trial on the first appeal or on the second appeal.

In addition to failing to make the appropriate motions which would have caused the setting aside of the verdict based on the wire fraud as object of the conspiracy and the substantive offense of wire fraud, both of which were time barred, counsel also failed to make similar motions directed

to the tax evasion charge as the object of the conspiracy. Had he done the foregoing a new trial would have resulted.

We also call to the court's attention a divergence in the circuits as to the meaning and applicability of *Yates*, *supra*. *See, e.g.*, *Clark v Crosby*, 335 F.3d 1303 (11th Cir. 2003) and compare with *United States v Edward*, 303 F.3d 605 (5th Cir. 2002) citing *United States v Wilson*, 116 F.3d 1066, 1080 (5th Cir. 1997) stating *Griffin* not *Yates* applies when a disjunctive instruction with a factually insufficient component is given, even if the component is also legally ineffective. *See further*, *United States v Pendergraft*, 297 F.3d 1198, 1210 (11th Cir. 2002).

The indictments of March 15, 1994 and May 10, 1994 charged a general conspiracy with four objects; wire fraud, money laundering (international and domestic) and tax evasion. The money laundering (international and domestic), of course, is out of the case and the wire fraud is time barred in the second indictment. This should mean, at the very least, that had a motion challenging the indictment been made it would have caused the tax evasion charge to fall as well with a new trial being ordered because both the substantive offense of wire fraud and the object of the conspiracy of wire fraud were time barred and the jury's verdict was based on that object.

Additionally, that counsel missed the issue is evidenced by the motions challenging venue pre trial which in terms of petitioner's case obscured the real issue, to wit, if count two (substantive offense of wire fraud) is dismissed on statute of limitations grounds the corresponding object of the conspiracy (wire fraud) made by counsel in June 1994 without pursuing the time barred aspect of the motion must also be

dismissed. *See Ben Zvi 1*, *supra* at 54-55. Raising issues with regard to venue, even if successful, are not a strategic justification for not raising the time barred claim for motions with regard to venue do not end the case while the time barred issue does. *United States v Hansel*, *infra*.

Further, the government conceded that the second indictment dated September 15, 1993, count 2, substantive offense of wire fraud and Count 1, same substantive offense, object of the conspiracy were time barred. See, petitioner's letter to second circuit dated September 17, 2003 and attached pages of government's answer to the COA application of the co-defendant in the Eastern District of New York which is reproduced as App 10a.

Beyond the argument set forth above if the object of the conspiracy (wire fraud) in the second, third and forth indictments are time barred the order of restitution should be vacated.

In the application for a certificate of appealability to the Second Circuit petitioner set forth the factual claims which were colorable, non-frivolous or conclusory as well as of a nature that reasonable jurists would find to be at least debatable.

INEFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL

Petitioner filed a Pre-Trial Motion on August 26, 1993 arguing Count One of the August 11, 1993 indictment must be dismissed because no overt act alleged therein falls within the five-year statute of limitations and further that count 2 must also be dismissed because the venue was admittedly

improper. Count Two alleged that the defendant violated the federal wire fraud statute predicated upon petitioner's causing a money transfer from Lloyd's of London to New York on August 15, 1988 in the Southern District of New York. The sole object of the conspiracy in Count One was the same as the substantive offense in Count Two; and the substantive offense in count 2 and the sole object of the conspiracy of wire fraud, was brought four days before the expiration of the statute of limitations. Based on these two arguments, defense counsel asked for the dismissal of the entire indictment. After the government filed the second indictment, petitioner's trial counsel did not pursue dismissal of the conspiracy count and took the position before the District Court that, ". . . that portion of the motion involving the statue of limitations was eventually mooted by the government's filing of the second indictment." 242 F.3d at 94 When the second indictment was brought on September 15, 1993, alleging the two counts, wire fraud as the substantive offense in the Southern District of New York and the sole object of the conspiracy, the same as in the first indictment the time period for the government to bring this had already expired 30 days before. In June 1994, Petitioner's counsel brought a Motion to Dismiss count two of the superseding indictment because it was time barred in the second, third and fourth indictments and argued that viewed in isolation; count two of the second, third and fourth superseding indictment is time barred. That count charges a wire fraud violation occurring on August 15, 1988 in the Southern District of New York. The third superseding indictment, however, was not filed until on or about May 10, 1994, almost nine months after the running of the statute of limitations. The defense attorney argued that the count survives only if the government is permitted to adopt the date of filing of the original indictment, to wit August 11, 1993. In determining whether or not a

superseding indictment is "broader" than the original indictment; i.e., whether the government can appropriately reference the filing date of the first, the Court should consider such facts as whether the new counts involve substantially different offenses, additional elements of proof or the potential for additional criminal penalties in comparison to the original indictment.

The government responded by saying that count two of the original indictment was well within the five-year statute of limitations period (it was brought on August 11, 1993, four days before the expiration of the five-year period) and that Roz Ben Zvi signed a stipulation tolling the five-year statute of limitations. (Petitioner did not sign any such stipulation.) The government further stated,

> Consequently, the government may adopt the original indictment's date of filing since neither the first, second or third superseding indictments substantially broaden the original charge contained in count two and that in any event, a ten-year statute of limitations applies to count two (18 U.S.C. § 3293) instead of a five-year statute.

The government agreed that count two must be dismissed because venue did not properly lie in the district. On December 15, 1994, 16 months after the statute of limitations expired on count 2, the District Court erroneously found that the ten-year statute of limitations applied, agreed with the government and dismissed count two based on venue. In holding the ten-year statute applied the trial Court also said count 2, substantive offense of wire fraud was the same as object of the conspiracy of wire fraud and that the ten-year statute of limitations applied to that object of the conspiracy.

Defendant's trial attorney was ineffective because he accepted the government's argument that the first indictment was moot instead of pursing the argument to dismiss the entire indictment. In *Ben Zvi 2* at 94 the Court of Appeals recognized the pre trial attorney did not pursue the issue of the statute of limitations as it applied to the August 11, 1993 indictment and stated at 97 that it was time barred. The District Court dismissed count two based on venue and the Second Circuit in *Ben Zvi 1* and *Ben Zvi 2* applied the five-year statute of limitations. Had petitioner's counsel pursued the arguments presented in August 1993, count one of the initial indictment would have been dismissed based on being time barred and count two would have been dismissed based on venue, as the District Court eventually found. The first indictment, therefore, would have been dismissed in its entirety as originally moved by defendant's counsel. Consequently, the application of the five-year statute of limitations, which was determined by the Appellate Court in *Ben Zvi 1* and *Ben Zvi 2*, and which was never challenged by the government after trial, would have caused count two, the substantive offense of wire fraud in the September 15, 1993 indictment, 30 days after the expiration of the period provided by the statute of limitations, count two in the second superseding indictment of March 15, 1994, seven months after the expiration of the period defined by the statute of limitations, and count two in the third superseding indictment of May 10, 1994, nine months after the period defined by the statute of limitations, all to be time barred. Every indictment alleged the acts to have taken place in the Southern District of New York. And, subsequently, count one, the corresponding object of the wire fraud conspiracy in each indictment would also have been time barred as in *Ben Zvi 1* at 55 in which the Court dismissed as time barred the money laundering counts and dismissed the corresponding objects

of conspiracy, money laundering. In the 3rd and 4th indictments, the government enlarged and expanded the scope of the wire fraud in count 1 by alleging that the two Ben Zvis sold for cash, the gold that was later claimed to have been stolen in a staged robbery and laundered the proceeds thereof by a series of international wire transfers and did not declare the proceeds on their income tax returns. The government did this by enlarging and expanding the scope of the wire fraud in count 1 but in *Ben Zvi 1* at 55 the Court found the original indictment did not provide for this expansion because there was no mention of any pre-robbery sale of gold or any transfers that were allegedly made to launder the proceeds from the alleged pre-robbery sale. According, in the 3rd and 4th indictments of the expansion was independently time barred.

Petitioner's attorney's failure to argue for the dismissal of the first indictment in its entirety and his agreement with the government's arguments that count two was not time barred, allowed the government to relate the three superseding indictments dates back to the original indictment, which first indictment as we have shown, should have been dismissed at the District Court without waiting for the second circuit to do so.

The government further argued that the second and third superseding indictments did not "broaden" the original charges and they were therefore allowed to use the date of the original indictment which fell within the time periods of the statute of limitations. However, the Second Circuit in *Ben Zvi 1* at 55 concluded that the second and third superseding indictments did substantially broaden the original charges. Accordingly, count two, the substantive offense of wire fraud and wire fraud as the object of the

conspiracy, were in fact time barred in the first, second and third superseding indictments and must be dismissed. The dismissal of these charges should also cause dismissal of the restitution.

In the second and third superseding indictments, the multi-object of the conspiracy included: 1 – wire fraud, 2 – domestic money laundering, 3 – international money laundering and 4 – tax evasion. As demonstrated, 1 – wire fraud is time barred, 2 and 3, domestic and international money laundering have already been found to be time barred by the Second Circuit 168 F.3d at 55 leaving only tax evasion as a timely object of the conspiracy. The Court of Appeals in *Ben Zvi 1* at 56 found that the jury's verdict was valid because it was based on wire fraud, a timely object of the conspiracy. However, if, as we have shown, the wire fraud was in fact time barred, then the jury's verdict would have been based on an untimely time barred object of the conspiracy. The Court would, under this set of facts, have no choice but to reverse the conviction on the only remaining conspiracy count, dismiss the wire fraud and restitution charges and grant a new trial on the only remaining object of the conspiracy, tax evasion.

Finally, in the third and fourth indictments, the only timely object of conspiracy (out of four) is tax evasion. And the only timely overt act of the conspiracy in the second, third and fourth indictments is drawing checks from Chemical Bank of New York as was held by the Court in *Ben Zvi 2* at 97-98, which acts were all alleged to have occurred in Manhattan in the Southern District of New York as was well supported by testimony at trial and the jury was instructed that they had to choose only one of the seventeen overt acts committed in the Eastern District (all of which were time barred).

All of the remaining overt acts were time barred in the second, third and fourth indictments as confirmed by the Second Circuit in *Ben Zvi 2* at 97-98 *see also Fuchs v United States*, *supra* at 961-962.

Based on the above, there is no way the jury could find an overt act of the conspiracy to be timely filed within the statute of limitations being committed in the Eastern District in accordance with the instruction of the Court to the jury. In *Ben Zvi 1*, he Court held the jury found wire fraud as an object of the conspiracy but this is really irrelevant since the wire transfer of the August 15 sale of the gold, the transfer of cash to Switzerland or Israel and/or bringing it back to the United States were all time barred in the fourth indictment.

Accordingly the trial attorney failed to recognize and point out to the Court that only one overt act of the conspiracy was timely filed: the drawing checks from Chemical Bank, and that such act was committed in the Southern District whereas the Court instructed the jury that they could only find the defendant guilty on this count if it were to have been committed in the Eastern District, which it was not.

Defendant's trial attorney did not assert that the government failed to establish any of the elements of count one 18 U.S.C. § 371 beyond a reasonable doubt and that the jury's verdict was based on the time barred object of the conspiracy, wire fraud and the time barred overt act of the conspiracy. Had the trial attorney brought these facts to the Court's attention, the Court would have dismissed wire fraud as the object of the conspiracy as being time barred; the Court would have dismissed the restitution and would have granted a new trial on one object of the conspiracy, tax evasion.

INEFFECTIVE COUNSEL ON THE FIRST APPEAL

In the first appeal, defendant's attorney failed to present the argument to the Court of Appeals that the first indictment should have been dismissed in its entirety and in the second, third and fourth indictments, the substantive offense of wire fraud in count two and the corresponding sole object of the conspiracy in count one were time barred. Defendant's attorney argued that two of the four objects of the conspiracy, domestic money laundering and international money laundering, were time barred and the Second Circuit agreed. However, as shown above, defendant's attorney should have additionally argued that wire fraud, as an object of the conspiracy, was also time barred, and the jury's verdict was possibly based on that object, leaving only tax evasion as the only timely object of the conspiracy. It is also clear that counsel on the first appeal not only did not argue the trial attorney's motion of August 26, 1993 to dismiss the entire first indictment of August 11, 1993, he did not include the motion as part of the record on appeal. In *Ben Zvi 1* at 55 the Second Circuit stated, "Defendants are correct that a conspiracy conviction must be reversed where one or more objects is invalid and it is impossible to tell which ground the jury selected" and he also did not argue that in counsel's motion pre trial (June 1994) that count 2, wire fraud and object of wire fraud in count 1 were time barred in the second, third and fourth indictments. However, the Court went on to say at 56, "The jury's money laundering verdict convincingly demonstrates that the jury found the object of wire fraud, which fell within the limitations period" and they affirmed the conspiracy conviction because the verdict was based on timely grounds. It naturally follows, that had the attorney argued, and the Court agreed, that the wire fraud object was not timely there would be no question but that the jury's

verdict would have to be reversed because the jury's verdict would have been based on the time barred objects of wire fraud . In fact, in *Ben Zvi 2* at 94 the Court stated, "We did so (sustained the conspiracy conviction) on the grounds that the jury instructions and verdict form revealed that the jury had found wire fraud as an independent object of the conspiracy and *no challenge to the timeliness of the wire fraud object was made during the appeal.*" (emphasis added) It is clearly implied that had the attorney argued that the wire fraud object was not timely, the Court would have so found.

In addition, defendant's attorney failed to state that the jury based their verdict on all of the elements of 18 U.S.C. § 371, on untimely grounds, untimely objects of the conspiracy and untimely overt acts of the conspiracy. Had counsel presented this argument, the Second Circuit would have dismissed wire fraud as the object of the conspiracy as it did with both money laundering objects and the Court would also have dismissed the restitution and would have granted a new trial on tax evasion as the object of the conspiracy and the Court would have immediately released petitioner from custody.

INEFFECTIVE ASSISTANCE ON THE SECOND APPEAL

In the second appeal, defendant's attorney argued that in the first indictment (August 11, 1993) Count One (conspiracy) was time barred because the government did not allege any of the timely overt acts of the conspiracy. More precisely, he argued: The second overt act added in the Second Indictment alleged that ". . . [I]n or about and between August 1988 and December 1989, the defendant . . . caused checks to be drawn from Chemical Bank account No. 041-009703

in payment of the insurance claim." While this alleged act falls within the limitations period, it is in no way in furtherance of the conspiracy alleged in the Second Indictment. As this Court made clear in *Grunewald*, "[it] is the scope of *the conspirational agreement* (emphasis added) which determines . . . whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." 353 U.S. 391 at 397. The attorney argued the general conspiracy was time barred based on his Grunewald argument which was clearly erroneous because he limited the statute of limitations of general conspiracy by the time barred object of the conspiracy even though there was still one valid timely object of the conspiracy, tax evasion.

He also argued that in the second, third and fourth indictments, the wire fraud objects were not timely and all of the overt acts were untimely and only one alleged overt act, which was committed in the Southern District, while timely was not in furtherance of the conspiracy. The Second Circuit agreed that the wire fraud conspiracy in the first indictment was time barred and dismissed that charge but found against the defendant that only one overt act alleged by the government was in "furtherance of the conspiracy in the second, third and fourth indictments and that they were independently timely" *Ben Zvi 2* at 97-98. The attorney should have argued that the first indictment should have been entirely dismissed, which includes conspiracy (count one) based on the statute of limitations and that the substantive offense of wire fraud (count two) should also have been dismissed based on venue. He should have continued to argue and refer to the June 1994 pre trial motion that the substantive offense of wire fraud of count 2 in the second, third and fourth indictments were time barred which makes the corresponding object of conspiracy, wire fraud in count one, also time

barred. Whether or not the overt acts were timely or whether the general conspiracy was timely becomes irrelevant. In *Ben Zvi I* the Court dismissed the money laundering objects of the conspiracy when they dismissed as time barred the substantive offense of domestic and international money laundering even when the same overt act was timely and the general conspiracy was timely. And, referring to the first appeal, if wire fraud as the object of the conspiracy was time barred, the jury's verdict was based on time barred objects of the conspiracy and would have to be reversed. On the second appeal, counsel also failed to argue that the first indictment (August 11, 1993) should be dismissed entirely based upon motion brought by petitioner on August 26, 1993.

Finally, regarding the overt act, the attorney never argued that in the Court's instructions to the jury and the jury's verdict were based on untimely overt acts. And, that such instructions and verdict were based on all the element of 18 U.S.C. § 371 – all on untimely grounds, untimely objects of the conspiracy and untimely overt acts of the conspiracy.

Had the attorney argued this in the second appeal, the Second Circuit would have reversed the conviction and dismissed wire fraud as the object of the conspiracy on the basis of being time barred, dismissed the Order of Restitution and granted a new trial on tax evasion on the only remaining object of the conspiracy.

The above references in the application to the Second Circuit for the COA raised the substantive constitutional claim that counsel were ineffective in failing to make the appropriate argument that wire fraud as object of the conspiracy in the second, third and fourth indictments were

time barred. Any doubt that this was a meritorious claim which should have been pursued by all counsel is dissipated by that Court's decision at 242 F.3d at 97 which dismissed the conspiracy count based on being time barred in the 1st indictment dated August 11, 1993. (This indictment was dismissed entirely.) The alleged object of the conspiracy to commit wire fraud (dated August 15, 1988) was the only indictment to timely allege the sole object of the conspiracy to commit wire fraud. (This indictment was filed four days before the running of the statute of limitations of sole object of conspiracy to commit wire fraud.)

Further substantiation of petitioner's claim is found in the opinions of the Court of Appeals in *Ben Zvi*, 242 F.3d 89, 93-94 and 168 F.3d at 53. The Court recognized thereat that the dates of the indictments were for August 11, 1993 and September 15, 1993 plus that the third and fourth indictments were from March 15, 1994 and May 11, 1994 as well as the recognition of dates of the criminal charges in the first and second indictments which are count 2, substantive offense of wire fraud and count one, object of wire fraud from August 15, 1988.

The Second Circuit's dismissal of the 1st indictment dated August 11, 1993 (*see* 242 F.3d at 97) on the basis of its being time barred leads beyond per adventure of doubt to the conclusion that wire fraud in the 2nd indictment of September 15, 1993 (alleging wire fraud as sole object of conspiracy which occurred on August 15, 1988 in count 1) was time barred since the 2nd indictment was filed by the government after 5 years and 30 days had elapsed since the date of the object of the conspiracy.

The Court also recognized that all expansion of wire fraud in the 3rd and 4th indictments were independently time barred – alleged pre-robbery sale of the gold, funds transfers from Israel and Switzerland allegedly used to launder the proceeds from the pre-robbery sale of the gold. *See* 168 F.3d at 55.

In addition, the government conceded that the 2nd indictment dated September 15, 1993, count 2, substantive offense of wire fraud and count 1, same substantive offense, object of the conspiracy were time barred. *See* petitioner's letter dated September 17, 2003 and attached pages 8-9 of government's answer to COA application of co-defendant in Eastern District reproduced as App. 10a.

By this Court's dismissal of count 1 (indictment dated August 11, 1993) on time barred grounds and the District Court's dismissal of count 2 on venue grounds there can be no doubt, as is made clear by the Second Circuit's opinions in the two Ben Zvi appeals that wire fraud as object of the conspiracy is time barred in the 2nd, 3rd and 4th indictments.

Had the prior attorneys made the above argument the Court of Appeals, as per its own opinions, would have dismissed the criminal charges in the first and/or second appeal and in the first appeal at 168 F.3d at 56 would have found the jury's verdict was based on time barred objects of the conspiracy.

Clearly, the wire fraud object of the conspiracy became time barred in the 2nd, 3rd, and 4th indictments after the Court of Appeals dismissed the 1st indictment (242 F.3d at 97). It follows then, as the night does the day that whether the object is time barred is irrelevant for the government filed

only one timely overt act – for purposes of the general conspiracy. And, petitioner has only challenged and asked to dismiss wire fraud as object of this conspiracy and grant a new trial for tax evasion as object of the conspiracy because the government had only one timely overt act. 242 F.3d at 94.

With the above holdings in mind it is not even debatable that petitioner demonstrated the denial of a substantial constitutional right. The Court of Appeals has flat out held that the indictments and charges referred to above were time barred. Clearly, then, if prior counsel understood and saw, as the Second Circuit ultimately held, that the indictments and charges above mentioned were beyond the statute of limitations proper motions to dismiss would have been made and granted. Failure to raise a statute of limitations claim comes squarely within *Strickland v Washington*, 466 U.S. 684 because the successful assertion of the claim results in a dismissal of charges. *United States v Hansel*, 70 F.3d 6 (2nd Cir. 1995).

It follows then that no reasonable jurist reading the opinions of the Court of Appeals could come to any conclusion other than petitioner has more than made out the denial of a substantial constitutional right within the terms of *Miller-el* and *Slack*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW MURASKIN
Attorney for Petitioner
34 Julia Circle
Middle Island, NY 11953
(631) 924-1486

APPENDIX

APPENDIX A — ORDER AND DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING MOTION FOR RECONSIDERATION FILED OCTOBER 1, 2003

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 1st Day of October Two thousand and three.

Present:

Hon. Roger J. Miner,
Hon. Guido Calabresi,
Hon. Chester J. Straub,
Circuit Judges

03-2214

Luiz Ben Zvi,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

Appendix A

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. The appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseanne B. MacKechnie, Clerk

By: s/ Lucille Carr

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DENYING APPLICATION FOR CERTIFICATE OF APPEALABILITY DATED APRIL 15, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-02-1289 (TCP)

LUIZ BEN ZVI,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PLATT, District Judge.

Petitioner Luiz Ben Zvi ("Ben Zvi" or "Petitioner") applies for approval of a third appeal to the Second Circuit Court of Appeals by way of a Certificate of Appealability from this Court's Memorandum and Order dated March 10, 2003, denying Ben Zvi's petition to vacate, set aside or correct her sentence pursuant to 28 U.S.C. § 2255.

At the outset, it should be noted that on Count One, for violation of which Petitioner received a sentence of five years for conspiracy to, *inter alia*, impede the collection of income taxes, the statutory penalty is five years or sixty months.

18 U.S.C. § 371. That is the sentence Petitioner received and in all likelihood would receive if there were a remand in light of the large amounts of money involved and the extent of the conspiracy in this case. *See Iannelli v. United States*, 420 U.S. 770, 778 (1975) ("[T]he Court has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose.") (citing *Clune v. United States*, 159 U.S. 590 (1895)); *United States v Cattle King Packing Co., Inc.*, 793 F.2d 232, 242 (10th Cir. 1986) (upholding defendant's four year imprisonment on the conspiracy conviction, which was longer than the maximum sentence of three years that could have been imposed on any of the six substantive charges).

Assuming nevertheless, *arguendo*, that such is not the case, there is no legitimate reason to grant the requested certificate herein.

As indicated in this Court's March 10th Memorandum and Order, the Government has more than adequately explained that counsel for Petitioner "made precisely the argument Ben Zvi now criticizes him for overlooking" and "cannot be blamed for the Court of Appeals' rejection of this argument." (Mem. in Opp. to Pet., dated Apr. 24, 2004, at 10-11.) As fully detailed in the Government's memorandum, the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984) have not been met.

For the foregoing reasons, Petitioner's application must be, and the same hereby is, DENIED.

Appendix B

SO ORDERED.

s/ Thomas C. Platt
Thomas C. Platt, U.S.D.J.

Dated: Central Islip, New York
April 15, 2003

APPENDIX C — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DENYING APPLICATION FOR RELIEF DATED MARCH 10, 2003

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-02-1289 (TCP)

LUIZ BEN ZVI,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER

PLATT, District Judge.

Before this Court is an application for relief brought by petitioner Luiz Ben Zvi ("Petitioner" or "Ben Zvi") to vacate, set aside or correct her sentence. In the instant petition, brought pursuant to 28 U.S.C. § 2255, Ben Zvi claims she was deprived of her right to effective assistance of counsel by both trial and appellate counsel's allegedly improper handling of a statute of limitations issue. For the reasons stated in the United States' opposition—namely that Petitioner has already made, and the Court of Appeals for the Second Circuit has already rejected (*United States v. Ben*

Appendix C

Zvi, 168 F.3d 49, 56 (2d Cir. 1999); *United States v. Ben Zvi*, 242 F.3d 89, 97-98 (2d Cir. 2001)), the very arguments proffered by Ben Zvi in the instant petition—Petitioner's application for relief under Section 2255 is hereby DENIED.

SO ORDERED.

s/ Thomas C. Platt
Thomas C. Platt, U.S.D.J.

Dated: Central Islip, New York
March 10, 2003

APPENDIX D — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING CERTIFICATE OF APPEALABILITY FILED DECEMBER 23, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23 day of December two thousand three.

Present:

Hon. Roger J. Miner
Hon. Guido Calabresi,
Hon. Chester J. Straub,
CIRCUIT JUDGES

03-2214

Zvi

v.

USA

Appendix D

A Motion for Reconsideration having been filed herein by pro se appellant Louise Ben Zvi,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is Denied.

ROSEANN B. MACKECHNIE, Clerk

By: s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

APPENDIX E — LETTER RE: *LUIZ BEN ZVI v. UNITED STATES* IN CONNECTION WITH APPLICATION FOR CERTIFICATE OF APPEALABILITY IN SECOND CIRCUIT

September 17, 2003

United States Court of Appeals
Second Circuit
40 Foley Square
New York, New York

Re: *Luiz v. Ben Zvi v United States* 03/2214
application for COA

Dear Honorable Members of the Court:

In connection with the above referenced COA application pending before this Court may I respectfully bring to your attention new matter which was not available to counsel or petitioner at the time of serving and filing the above COA motion.

In our papers we urged, as part of our claim (see pages 10-12, 15-16, 17-18) that the September 15, 1993 indictment filed by the government, count 2 wire fraud, should have been dismissed on statute of limitations grounds and that said dismissal of count 2 would result in the corresponding object of the conspiracy, wire fraud in count 1 being dismissed as well; and that counsel was ineffective in that they did not pursue that the first indictment of August 11, 1993 returned against petitioner which was dismissed entirely and count 2 returned against petitioner in the first superseding indictment on September 15, 1993 which was dismissed on venue grounds should have been dismissed because it was

time barred and the resulting consequences that such dismissal would have on the rest of the case against petitioner.

In an answer dated August 12, 2003 to a COA application made by co-defendant in the United States District Court for the Eastern District the government states at page 8 and 9 thereof (copy attached) that in the wire fraud charge in the first superseding indictment against petitioner "(t)he substantive wire fraud charge alleged a wire transmission on August 15, 1988 (A 96), a date more than five years—the limitations period—prior to the filing of the indictment". This concession by the government that count 2 in the first superseding indictment returned against petitioner was time barred should be considered in terms of our argument for a COA and cause that it be granted.

We also note, that unlike her co-defendant, petitioner never signed any stipulation extending the statute of limitations. 168 F.3d at 54.

Very truly yours,

Matthew Muraskin
Attorney for petitioner

Cc: Peter Norling
Assistant United States Attorney

Appendix E

* * *

In his attack on Count One, Ben Zvi Attempts to demonstrate that the wire fraud object is invalid. The wire fraud was first charged against Ben Zvi in the first superseding indictment, which was filed on September 15, 1993; the charge had been made against Luiz Ben Zvi alone in the initial indictment, in which Roz Ben Zvi was not charged because of the stipulation. (Roz Ben Zvi was also charged, with Luiz, in the wire fraud conspiracy count in the same superseding indictment.) The substantive wire fraud charge alleged a wire transmission on August 15, 1988 (A 96), a date more than five years — the limitations period — prior to the filing of the indictment. The expiration of the limitations period, on August 15, 1993, however, indisputably falls within the scope of the stipulation under any interpretation, including Ben Zvi's. The count was ultimately dismissed for lack of venue, as it alleged that the offense was committed in the Southern District of New York.

* * * *